



August 23, 2002

Mr. Martin A. Hubert
Deputy Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR2002-4705

Dear Mr. Hubert:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167522. Your office has assigned this request tracking number TDA-PIR-02-0401.

The Texas Department of Agriculture (the "department") received a request for information on certified rice seed acres in Texas by variety. You advise that you are releasing most of the requested information. You claim that the remaining requested information is excepted from disclosure under section 552.110 of the Government Code.¹ Pursuant to section 552.305 of the Government Code, the department notified three producers of the request because their proprietary interests are implicated.² You advise that one of the producers does not object to the release of its information, and that you will release that information. Of the remaining two producers, this office has received a response from Garrett Farms. We have considered the exception you claim and have reviewed all of the submitted arguments.

As an initial matter, we note that subsections 552.301(a) and (b) of the Public Information Act provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within

¹ Although you state in your brief that the information at issue may also be excepted under section 552.101 (information made confidential under other law), you do not cite any provision of law, nor are we aware of any, that would make the information confidential pursuant to this section.

² See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released).

one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

As you acknowledge, this office did not receive the request for a decision within the ten business day period mandated by section 552.301(a). You assert that this deadline was tolled during the time period in which the department sought to obtain permission from the producers for release of their information. We note that only communications with a requestor for the purpose of clarifying or narrowing a request for information can toll a governmental body's deadline under section 552.301(b). *See Gov't Code § 552.222; Open Records Decision No. 663 at 2-5 (1999)* (addressing circumstances under which communications with requestor to clarify or narrow request for information will toll section 552.301(b) deadline). In this instance, the department did not contact the requestor for the purpose of narrowing or clarifying this request for information. The department has not otherwise accounted for its failure to request this decision within ten business days of its receipt of the request for information.

Because the department failed to comply with the time period prescribed by section 552.301, the requested information is presumed to be public. *See Gov't Code § 552.302*. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. This office has long held that a compelling reason to withhold information exists, sufficient to overcome the section 552.302 presumption of openness, where the information at issue is made confidential by another source of law or affects third party interests. *See Open Records Decision Nos. 26 (1974), 150 (1977)*. The application of section 552.110 is such a compelling reason.

Section 552.110 protects the proprietary interests of private parties that submit information to governmental bodies by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information for which it is demonstrated, based on specific factual evidence, that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See Gov't Code § 552.110(a), (b)*. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also Open Records Decision No. 552 at 2 (1990)*. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a

chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).³ If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the requested information, this office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990) (addressing statutory predecessor); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958).

Under section 552.110(b), the governmental body or private entity must provide a specific factual or evidentiary showing, and not conclusory or generalized allegations, that substantial competitive injury likely would result from the release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (addressing required showing); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

You explain that for most varieties of certified rice, release of the number of acres grown in Texas would not require disclosure of the number of acres grown by individual producers. However, you advise that because some varieties are grown by a single producer, disclosing the number of acres of these varieties being grown in Texas may allow the requestor to associate an acreage amount with a particular producer. The department asserts that in relation to these varieties, divulging how many acres are dedicated to a particular variety

³ The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

would allow competitors to discover the producers' production and marketing strategies and that

[t]he agricultural niche for producers of innovative pure genetic seeds and plants is highly specialized and very expensive. Seed and plant developers may spend millions of dollars crossing different varieties to develop a particular strain of seed or plant that suits a particular agricultural region in both domestic and international areas. Once developed, each unique seed or plant type is proprietary and belongs to the producer. One of the vital competitive advantages that a seed producer has over his competitors is the producer's strategic use of his resources to produce new seeds and plants.

We conclude that the department has demonstrated by assertion of specific factual evidence that release of information that reveals how many acres are dedicated to a particular variety of seed when that variety is grown by a single producer would cause substantial competitive harm to the producers from whom that information was obtained. We therefore find that this information must be withheld on behalf of the two producers who object to the release of their information under section 552.110(b) of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839.

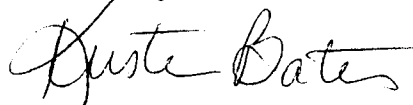
The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 167522

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